

FAIR POLITICAL PRACTICES COMMISSION
Memorandum

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Kenneth L. Glick, Commission Counsel
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Adoption of Regulation 18754 (Statements of Economic Interests:
Members of Boards or Commissions of Newly Created Agencies)

Date: February 19, 2003

I. OVERVIEW

SB 1620 (Stats. 2002, Chapter 264, copy provided at Appendix B to this memorandum), passed in the prior legislative session, added new Government Code section 87302.6 to the Political Reform Act (“Act”),¹ effective January first of this year. This new section requires “*a member* of a board or commission of a newly created agency” [emphasis added] that has yet to adopt an approved conflict of interest code to file a statement of economic interests “at the same time and in the same manner as those individuals required to file pursuant to section 87200.”² (Section 87302.6.) Once the agency has adopted an approved conflict of interest code, a member is to file his or her statement of economic interests pursuant to that code.

The requirements concerning **timing and content** of statements currently filed pursuant to section 87200 are found generally at sections 87202 through 87210, and at regulation 18723. Section 87500, and in some instances, regulation 18753, state **where** these individuals are to file their statements and also provides the identity of the **filing officer**. Generally, this varies according to whether the section 87200 filer holds office with a state, county, city, or multi-jurisdictional agency. These factors are summarized in TABLE I, below, subject to certain exceptions based on the calendar date when an official assumes or leaves office.

¹ Government Code sections 81000-91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Individuals filing statements of economic interests pursuant to section 87200 (hereinafter, “statement” or “statements”) generally are elected state officers, judges and commissioners of courts of the judicial branch of government, members of the Public Utilities Commission, district attorneys, county counsels, mayors, city attorneys, public officials who manage public investments, and those who hold other offices specifically named in section 87200, plus candidates at any election for any of the foregoing offices.

TABLE I. - EXISTING FILING OBLIGATIONS, SECTION 87200 FILERS

| Jurisdiction | Timing | | | Content | Where to File*** | Filing Officer*** |
|--|----------------------|-----------|----------------|-----------------|-------------------------------------|-------------------|
| | Assuming Office | Annual | Leaving Office | | | |
| State | 30 days/ 10 days* | March 1** | 30 days after | full disclosure | Agency - (copy to SOS) org. to FPPC | FPPC |
| County | 30 days | April 1 | 30 days after | full disclosure | County Clerk - original to FPPC | FPPC |
| City | 30 days | April 1 | 30 days after | full disclosure | City Clerk - original to FPPC | FPPC |
| Multi-County Jurisdictions | 30 days | April 1 | 30 days after | full disclosure | FPPC or Multi-County Agency | FPPC/M-C Agency |
| * If appointment or nomination is subject to Senate ratification, the official must file within 10-days of his or her nomination or appointment. **State officials who manage public investments, other than elected CalPERS officers, file on April 1. ***The filing location and filing officer for certain officials who manage public investments are separately identified in regulation 18753. | | | | | | |

An interested persons meeting to discuss the proposed regulation was held on February 6, 2002. A number of members of the public appeared in person and several more participated by teleconference. The comments received at this meeting are addressed in the discussion of the proposed regulation, below.

II. PROPOSED REGULATION 18754

Proposed regulation 18754 is narrow in scope and is intended to mirror the substantive and procedural requirements presently applicable to section 87200 filers. However, where to file and the identity of the filing officer is a scheme unique to this regulation, although existing locations and filing officers, as used for other purposes, are also used in this regulation. As discussed in more detail below, decision points generally of a clarifying nature are presented to the Commission with respect to: 1) what is a “board or commission” and a “newly created agency,” 2) whether assuming office statements are to be filed by members of boards or commissions of newly created agencies formed before January 1, 2003, and 3) the filing location and filing officer for statements filed by a member of an independent regional agency, such as one organized under a Joint Powers Agreement. The specific provisions of the proposed regulation are summarized below:

A. Applicability

The filing obligations under the regulation apply to a member of a board or commission of a newly created agency that is required under section 87300 of the Act to adopt a conflict of interest code. While this language tracks the literal language of section 87302.6, neither “board,” “commission,” nor “newly created” are defined in the Act. Consequently, this language, simple as it appears, is ambiguous in that more than one reasonable interpretation can be given to language defining the scope of the new statute, and hence this regulation. The legislative intent behind the statute is instructive in these circumstances.

The legislative history (see Appendix B to this memorandum) addresses obliquely this issue of applicability. In this regard, the discussion that accompanied SB 1620 in its passage through the Senate offered the following:

“According to the author, under current law it is possible that a person can serve on a new agency, board or commission and make decisions on rules, regulations, permits, and contracts for almost a year before they are required to file a SEI. The current law requires that a new agency submit a proposed conflict of interest code within six months after it comes into existence. Persons appointed to a new agency, board or commission then have 30 days after the adoption of the agency’s conflict of interest code to file a SEI. The intent of this bill is to require all newly appointed persons to state boards or commissions to file a SEI within 30 days of appointment or assuming office.” (Senate Floor Analysis dated August 5, 2002, included at Appendix B to this memorandum.)

In addition, the Assembly’s committee analysis clarified that section 87302.6 *does not apply to the staff of newly created agencies*. (Hearing dated June 11, 2002, also included at Appendix B to this memorandum.) The complete legislative history can be summed up by stating that it is the Legislature’s intent with SB 1620 and section 87302.6 to, in essence, plug a perceived gap in financial disclosure by requiring *decisionmakers* at new agencies to file statements with full disclosure until such time as their agency has in place an approved conflict of interest code imposing filing obligations on these individuals.

Subdivision 18754(a)(2), Decision 1: Comments were received at the interested persons meeting questioning whether the filing obligations enacted in SB 1620 are intended to apply to newly created boards or commissions of existing agencies that have already adopted an approved conflict of interest code in cases where the members of the new board or commission have not yet been designated. **Decision 1** considers whether to apply regulation 18754 to these members.

In this regard, to say that a member would have no filing obligations under section 87302.6 merely because his or her agency has adopted an approved conflict of interest code relies on an assumption, implicit in the statutory language,³ that the agency has included the member’s new position in the agency’s code. There are circumstances when an agency could have adopted an approved conflict of interest code prior to creating a new board or commission, the members of which would necessarily not be included in that code. Arguably, it is the Legislature’s intent that the interim filing obligations of section 87302.6 apply until the approved code could be amended to include these new positions. The policy argument in favor of applying the regulation in this fashion is that it would be clear that such individuals have an immediate financial disclosure obligation.

³ The language reads, “A member shall file his or her statement pursuant to section 87302 once the agency adopts an approved conflict of interest code.” This can reasonably be read as intending to resolve which, of two conflicting disclosure obligations, prevails when both the code and section 87302.6 would otherwise apply. Such a reading is consistent with the interim or “stop-gap” nature of the filing obligations imposed under section 87302.6.

At present, when there is a change of circumstances agencies have up to 90 days to submit conforming amendments to their conflict of interest code, for approval by their code reviewing body. (Section 87306.) Once the code amendments are submitted, several months can elapse before the code reviewing body's review and approval process is completed. (Section 87303.)

The policy argument against defining this regulation to include members of newly created boards or commissions of existing agencies is that the disclosure required under this regulation is broader than the disclosure that may be applicable once provided for under an agency's conflict of interest code. In addition, as discussed above, the existing statutory scheme for section 87300 filers already provides a means for imposing financial disclosure on members of newly created boards or commissions of existing agencies. Specifically, section 87306 requires that when a code change is necessitated by changed circumstances, including the creation of new positions which must be designated in the agency's conflict of interest code, amendments or revisions dealing with the changed circumstances are to be made and submitted to the agency's code reviewing body for its approval. The Legislature did not see fit to amend section 87306, as would be the case if it wanted to impose a more immediate disclosure obligation on members of newly created boards or commissions of existing agencies.

The regulation proposes (Decision 1) to define "newly created agency" with reference to the Act's definition of agency (section 82003), "state agency" (section 82049) and "local government agency" (section 82041). These statutes contemplate that a board or commission itself is an "agency" for purposes of the Act. Staff further believes that the proposed definition of "newly created agency" accomplishes the Legislature's intent to plug a perceived gap in financial disclosure. Inasmuch as the Act does not define a "board," "commission" or "newly created agency," the Commission is not barred by statute from adopting the definition as proposed.

Recommendation - Decision 1: In light of the above, staff recommends adopting Decision 1 and applying the existing definition of "state agency" and "local government agency" to clarify that a "board" or "commission" is included within the definition of "newly created agency" for purposes of this regulation.

Subdivision 18754(a)(2), Decision 2: **Decision 2** considers whether regulation 18754 is to apply to boards or commissions of all agencies defined above as "newly created agencies" or only when the agency has been created or determined to be an agency on or after the January 1, 2003, effective date of new section 87302.6. If the Commission wishes to limit the application of the statute and regulation to agencies that are created or determined to be an agency *on or after* January 1, 2003, the Commission should add the language at **Decision 2.**"

Public comment was received at the interested persons meeting suggesting that applying regulation 18754 to members of boards or commissions of agencies whose existence pre-dates the effective date of the statute is impermissible retroactive rulemaking. The argument offered

was that since SB 1620 would become effective by operation of law⁴ on the January 1st following enactment of the bill (e.g., January 1, 2003), the Legislature intended the new filing obligations to apply only to agencies newly created after that date. The courts in California generally disfavor giving retroactive effect to a new law (*Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207 (1988)), and to apply the statutory provisions to agencies created before that date would, it is argued, be contrary to this judicial interpretation. These commentators also suggested that newly created agencies existing before January 1, 2003, would be sufficiently mature in the promulgation and adoption of an approved conflict of interest code so that there would be no appreciable period of time of non-disclosure for those members.

Staff does not agree that this is retroactive rulemaking. An impermissible “retroactive” application “applies the new law of today to the conduct of yesterday.” *Rosasco v. Commission on Judicial Performance*, 82 Cal. App. 4th 315, 322 (2000). A statute is not “retroactive” merely because some of the facts upon which its application depends came into existence before its enactment. *Kizer v. Hanna*, 48 Cal. 3d 1, 7 (1989). In other words, a statute operates retroactively when it changes the legal consequences of an act **completed** before the effective date of the statute. *Florence Western Medical Clinic v. Bonta*, 77 Cal. App. 4th 493, 502 (2000).

Recommendation: Staff recommends not adopting **Decision 2** and, thus, applying these financial disclosure provisions to all members of governing boards or commissions of all newly created agencies, *no matter when created*.⁵ Thus, staff recommends removal of the bracketed language at **Decision 2**. In this regard, however, a member who assumed office on a board or commission of a newly created agency prior to January 1, 2003, and left office prior to that date, has no filing obligations under the transitional provision. In light of the public comment evidencing concern with potential retroactive application of the statute’s filing obligations, staff has inserted clarifying language in subdivision (b)(1)(A) to address this potential scenario.

Staff also notes the Commission’s historical trend has been to disfavor imposing new financial disclosure obligations when the precipitating event is a pre-existing circumstance. However, given the remedial nature of SB 1620 and its statutory intent, staff believes it appropriate in this instance for the Commission to impose these financial disclosure provisions on members of boards or commissions of newly created agencies when membership was acquired prior to the effective date of the new legislation.

Subdivision 18754(a)(3), no new decision points: The exceptions given at subdivision 18754(a)(3) clarify that the filing obligations imposed in the regulation do not apply to individuals whose filing obligations are found under section 87200, et seq. of the Act. There is

⁴ Government Code section 9600(a) provides that unless stated otherwise by its terms, a new statute goes into effect the first January 1 following the expiration of the 90-day period immediately following enactment of the statute.

⁵ With respect to existing agencies, the financial disclosure provisions apply only when a member’s newly created position is not included in an agency’s existing conflict of interest code. Staff notes that this recommendation is consistent with the conservative written advice given to Mr. Robert Dresser, General Counsel of the newly created California Labor & Workforce Development Agency, stating that section 87302.6, once adopted, will apply to any boards and commissions in existence on January 1, 2003. (*Dresser Advice Letter*, No. A-02-249.)

also an exception clarifying that the filing obligations imposed in the regulation do not apply to members of boards or commissions that lack decisionmaking authority, such as purely advisory boards or commissions. These exceptions are provided since in neither of these circumstances will the individual be eventually designated under a conflict of interest code.

B. When to File

Subdivision 18754(b)(1)(A): Proposed **Decision 2a** need only be considered if the Commission agrees with staff on **Decision 2** *supra*, and applies the requirements of the statute to all newly created agencies, irrespective of when created. This subdivision contains a transitional provision describing the time for filing assuming office statements by members of a board or commission of a newly created agency that has come into existence or has been determined to be an agency before the January 1, 2003, effective date of new section 87302.6, when that agency has not yet adopted an approved conflict of interest code including the member's position. If the Commission rejects staff's proposal on **Decision 2**, this language, and the discussion that follows, would have no application and need not be considered.

Under **Decision 2a**, assuming office statements are to be filed within 30 days from the effective date of this regulation. In other words, under this transitional provision if one were to take a snapshot on January 1, 2003, of all then-existing agencies with decisionmaking authority, eliminate from that picture agencies that have adopted an approved conflict of interest code with provisions applicable to the members of a particular board or commission (or agencies that amended their code to include these members' positions), the remaining agencies are subject to section 87302.6. Any member of a board or commission of one of these latter agencies, from that moment forward, is subject to section 87302.6.

Subdivisions 18754(b)(1)(B), no new decision points: This is the general rule. *This provision is necessary whatever the Commission decides on Decision 2a.* However, if the language at **Decision 2a** is retained, staff has provided optional introductory language that will blend the two provisions. Under (b)(1)(B), **assuming office statements** are to be filed within 30 days of appointment or nomination to office, unless the appointment or nomination is subject to Senate confirmation. In that event, the filing deadline is reduced to within 10 days of appointment or nomination. This is the same timing for assuming office statements filed by individuals under section 87200.

The Senate analysis accompanying the third reading of SB 1620 pointed out that a person whose appointment or nomination is subject to confirmation by the Senate is required to file their assuming office statement within 10 days after appointment or nomination, while others are required to file within 30 days. Thus, the new regulation's language requiring that filings be made at the same time as similar filings under section 87200 tracks this 10-day/30-day distinction.

Subdivision 18754(b)(2), no new decision points: Generally, **annual statements** for most public officials are to be filed each April 1. (Regulations 18723 and 18724.) This subdivision of proposed regulation 18754 imposes this date for the filing of annual statements. Consistent with

existing exceptions applicable to annual statements filed under section 87200, et seq., the first annual statement filing date is tolled for one year when a person assumes office between October 1 and December 31, and files an assuming office statement. Similarly, this filing date is tolled for one year for any person filing an assuming office statement pursuant to the transitional provision, above.

Subdivision 18754(b)(3), no new decision points: Leaving office statements are to be filed within 30 days after leaving office. Consistent with an exception applicable to section 87200 filers, a person’s leaving office statement can serve as his or her annual statement if the person leaves his or her position between January 1 and the April 1 deadline for his or her annual statement, and the filing officer is notified in writing that the person intends to invoke this provision. Another exception applicable to section 87200 filers is also made applicable to filings under this regulation. If a member completes a term of office and within 30 days thereafter, begins a term of the same or another office of the same jurisdiction, he or she is not deemed to assume or leave office for purposes of filing under this regulation. (Subdivision 18754(b)(4).)

C. Where to File

Subdivisions 18754(c), Decision Point 3: The proposed filing locations and filing officers for the filings to be made under this regulation are shown in Table II which follows:

TABLE II. PROPOSED FILING LOCATIONS AND FILING OFFICERS

| Jurisdiction | Where to File (option a) Same as § 87200 Filers, other than those who manage public investments | Where to File (option b) Same as § 87300 Filers | Filing Officer (option a) | Filing Officer (option b) |
|---------------------------|--|---|--|--|
| State | Agency, forward original to FPPC § 87500(g) or (n) | File with the newly created agency, or the agency’s code reviewing body identified in § 82011, as specified by the code reviewing body. § 87500(o); 2 Cal. Code Regs. section 18730(b)(4) | FPPC | As determined by the code reviewing body |
| County | County clerk, forward original to FPPC § 87500(e) | | FPPC | |
| JPA - Single County | Agency, forward original to code reviewing body § 87500(j) | | Code Reviewing Body | |
| Multi-County Jurisdiction | Agency, Board or Commission, unless FPPC elects to receive original § 87500(k) | | Agency, Board or Commission, unless FPPC elects to be filing officer | |
| JPA - Multi-County | Agency, Board or Commission, unless FPPC elects to receive original § 87500(k) | File with the newly created agency, or the agency’s code reviewing body identified in § 82011, as specified by the code reviewing body. § 87500(o); 2 Cal. Code Regs. section 18730(b)(4) | Agency, Board or Commission, unless FPPC elects to be filing officer | As determined by the code reviewing body |
| City | City Clerk, forward original to FPPC § 87500(f) | | FPPC | |

New section 87302.6 does not identify filing locations and filing officers for filings made under that section. The statute indirectly touches upon this point when it states that once the newly created agency adopts an approved conflict of interest code, a member is to file his or her statements pursuant to section 87302. The inclusion of this reference in the statute implies that filing locations and filing officers for statements filed *prior* to adoption of a conflict of interest code are in some manner different than as under the filing scheme applicable once a conflict of interest code is adopted. This argues that the statute's language stating that these interim filings are to be made "at the same time and in the same manner as those individuals required to file under section 87200" includes the filing locations and filing officers applicable to filings under section 87200. A conservative reading of this statutory language would have these interim statements filed in the same locations, and with the same filing officers, as statements filed pursuant to section 87200. Thus, staff is including as **Decision 3, option a**, language that incorporates the section 87200 filing locations and filing officers by referring to appropriate subdivisions under section 87500 of the Act. Fewer physical filing locations also lessen the risk of public confusion and potentially simplifies compliance obligations on the affected officials.

On the other hand, given the lack of any direct reference in the statute or its legislative history to filing locations and filing officers, the Commission may not be required to follow the section 87200 filing scheme with respect to filing locations and filing officers. In this regard, the legislative counsel's digest accompanying SB 1620 describes the current *timing and content* requirements applicable to statements presently filed by section 87200 filers. The digest states that section 87302.6 would require a member of a board or commission of a newly created agency to file statements of economic interests according to *these* [emphasis added] requirements, until the agency adopts an approved conflict of interest code.

The overall policy in selecting filing locations is to select a location that best serves the public interest. Public access to the filed information is a dominant aspect of the public interest in this context. This includes not only the physical ability to inspect and/or copy the material, but also the ability to determine, in the first instance, from where the material may be retrieved. Thus, there is facial appeal to a simplified filing scheme that will have these interim statements filed in the same locations as the member will file statements once his or her agency has adopted an approved conflict of interest code. From a conceptual viewpoint, fewer filing locations (e.g., with the official's agency) also lessens the risk of public confusion and potentially simplifies compliance obligations on the affected officials. On the other hand, it places greater responsibility on the agency's code reviewing body in that it has discretion to designate itself as the filing location and filing officer. A code reviewing body might then believe itself obligated to search out the existence of these newly created agencies so as to communicate the filing location for the interim statements of its members. **Decision 3, option b**, extends application of the section 87300 filing locations and officers to these interim statements.

Public comment was received suggesting agencies that are not within the county government's organizational structure (such as other independent regional agencies having jurisdiction countywide, including agencies formed under Joint Powers Agreements) should not have their members file these statements with the county. A county filing location, however, is

not possible under **Decision 3, option a** since that option tracks section 87200 filing requirements. Under **Decision 3, option b**, filings may be made with the member's agency, unless the county is the code reviewing body for the newly created agency and the county designates itself as the filing location. This public concern is not an issue under either of these options because the code reviewing body would ultimately make that determination.

Recommendation - **Decision 3, option b** represents a filing scheme less likely to result in changes to the filing location once a member is designated under his or her agency's conflict of interest code. Thus, staff recommends the Commission adopt **option b**, of **Decision 3**.

Coordination With Filings Under Section 87300, Section 18754(d): Once an agency adopts for the first time an approved conflict of interest code, designated employees are required under an existing regulation to file an initial statement within 30 days thereafter, disclosing reportable investments, business positions, interests in real property and interests in sources of income (including gifts and loans). (Section 87302(b).) Proposed section 18754(d) provides that an assuming office statement or annual statement filed under this regulation is deemed to satisfy the obligation to file an initial statement, pursuant to section 87302(b).

III. ADDITIONAL PUBLIC COMMENT

As of the date of this memorandum, no written comments on proposed regulation 18754 have been received. Several members of the public attended or participated by telephone for the purpose of commenting on this regulation when an interested persons meeting was held on February 6, 2002. A commentor suggested that use in the regulation of the phrase "county clerk" is archaic under the California Code. In support, this commentor pointed to SB 1019 passed in the 2001-2002 legislative session, which deleted many references in the California Code to "county clerk."

However, SB 1019 is a general clean-up bill removing from the California Code obsolete references to county clerks and others, with respect to certain functions they no longer perform. SB 1019 did not amend the Act and existing references therein to county clerks. SB 1019 carries no weight in context of implementing the Act and the Commission is free to disregard this bill in context of implementing section 87302.6. In any event, under **Decision 3, option b**, county clerks would not be designated as filing locations or filing officers unless the county so chooses.

IV. STAFF RECOMMENDATIONS

Staff recommends that the Commission approve for adoption proposed regulation 18754, as clarified in the manner discussed.